COURT OF APPEALS
DECISION
DATED AND FILED

May 25, 2004

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal Nos. 03-0919
03-2522

Cir. Ct. No. 00-CV-961

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV/III

NO. 03-0919

BRENNAN, STEIL, BASTING & MACDOUGALL, S.C., A LIMITED LIABILITY ORGANIZATION,

PLAINTIFF,

V.

BERNER CHEESE CORPORATION, NOW KNOWN AS BERNER FOODS CORPORATION, A FOREIGN CORPORATION, STEPHEN A. KNEUBUEHL, CHERYL M. KNEUBUEHL AND EDWARD C. KNEUBUEHL,

DEFENDANTS.

BERNER FOODS CORPORATION,

COUNTER-PLAINTIFF-THIRD-PARTY PLAINTIFF-APPELLANT,

V.

BRENNAN, STEIL, BASTING & MACDOUGALL, S.C., MARC T. MCCRORY, THOMAS S. HORNIG, PLAGER, HASTING & KRUG, LTD. AND LUMBERMANS MUTUAL CASUALTY COMPANY,

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COUNTER-DEFENDANTS-THIRD-
PARTY DEFENDANTS,

LYLE A. KRUG AND ISBA MUTUAL INSURANCE COMPANY,

COUNTER-DEFENDANTS-THIRD-
PARTY DEFENDANTS-RESPONDENTS.

NO. 03-2522

BRENNAN, STEIL, BASTING & MACDOUGALL, S.C., A LIMITED LIABILITY ORGANIZATION,

PLAINTIFF,

V.

BERNER CHEESE CORPORATION, NOW KNOWN AS BERNER FOODS CORPORATION, A FOREIGN CORPORATION, STEPHEN A. KNEUBUEHL, CHERYL M. KNEUBUEHL AND EDWARD C. KNEUBUEHL,

DEFENDANTS.

BERNER FOODS CORPORATION,

COUNTER-PLAINTIFF-THIRD-
PARTY PLAINTIFF-APPELLANT,

V.

BRENNAN, STEIL, BASTING & MACDOUGALL, S.C., MARC T. MCCRORY, THOMAS S. HORNIG, LYLE A. KRUG, LUMBERMAN MUTUAL CASUALTY COMPANY AND ISBA MUTUAL INSURANCE COMPANY,

COUNTER-DEFENDANTS-THIRD-
PARTY DEFENDANTS,

PLAGER, HASTING & KRUG, LTD.,

COUNTER-DEFENDANT-THIRD-

PARTY DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Rock County: JOHN W. ROETHE, Judge. *Reversed and cause remanded with directions*.

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 HOOVER, P.J. Berner Foods Corporation appeals a summary judgment dismissing its claims—legal malpractice, breach of fiduciary duty, implied indemnity, and civil conspiracy—against attorney Lyle Krug, his insurer, and his law firm Plager, Hasting, & Krug, Ltd.[1] While Berner provided expert testimony that Krug had breached the applicable standard of care for an attorney, it claims the trial court erred when it required expert testimony of causation as part of summary judgment proofs. We agree with Berner and therefore reverse the judgment and remand this case for further proceedings.

Background[2]

¶2 This case initially arose out of a claim by the law firm Brennan, Steil, Basting, and MacDougall, S.C., seeking unpaid attorney fees from Berner Cheese Corporation and its owners, the Kneubuehls. The fees were incurred by Berner Cheese in litigation against Dairy Source, Inc., and its owners, Tony and

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[1] Krug and his insurance company are the respondents in Appeal No. 03-0919. Plager, Hasting, & Krug, Ltd., is the respondent in Appeal No. 03-2522. We granted permission for consolidation of the appeals, and the law firm chose to proceed on Krug's briefs.

[2] Our background section comes primarily from the trial court's written decision. The background of this case is quite complex, and we appreciate the court's well-written condensation of the salient facts.

Rose Steinmann. Berner Cheese, renamed Berner Foods Corporation ("Berner"), filed a counterclaim against Brennan, two of its attorneys, and its insurer and third-party claims against Lyle Krug, Krug's law firm, and their insurer. Berner eventually settled with the Brennan firm and its attorneys, and the only remaining litigants on appeal are Berner and Krug, his insurer, and his firm (collectively, "Krug").

A. Previous Actions

¶3 The underlying action stems from a dispute between Berner and Dairy Source, Inc. Berner is an Illinois corporation that manufactures and sells cheese and processed cheese. Dairy Source is a cheese brokerage and distribution company owned by Rose Steinmann, whose husband Tony was Berner's vice president of sales and marketing. Dairy Source's offices are located in Delavan, Wisconsin.

¶4 Although Tony was a Berner employee, he worked out of Dairy Source's office, keeping Berner's records and equipment there. The office was leased to Dairy Source, but Berner paid half the rent and shared support staff and computer equipment with Dairy Source.

¶5 Tony had access to all of Berner's customers and had the only customer list. He also had Berner's formulas for the processed cheese production. Berner wanted to protect this proprietary information through an employment contract with Tony, but negotiations were unsuccessful and Tony resigned effective April 5, 1999.

¶6 After Tony's resignation, Berner met with its corporate counsel, Krug. Berner sought to retrieve its corporate documents from Tony and ensure

that neither he nor Dairy Source used Berner's information for themselves. Krug developed a self-help plan for peaceful entry, with the aid of Dairy Source employees, into Dairy Source's office to recover the documents. Berner argues that, although some risk was discussed, Krug assured it that self-help was perfectly legal and the best option. The entry was planned for April 12, 1999. Berner also intended to file a replevin action for any documents not recovered by the self-help procedure. Because Krug was Illinois counsel, he retained Wisconsin counsel—the Brennan firm—to file the replevin action. The engagement letter from Brennan to Krug specified that Brennan had only been retained for the replevin action.

¶7 On April 12, the Steinmanns were in Las Vegas for a trade show. Several Berner employees and agents entered the Dairy Source office, removing approximately thirty-three boxes of documents. The Steinmanns' subsequent litigation asserted this was an illegal raid, while Berner claimed it was a co-tenant of the office with the right to remove its own property.

¶8 On April 13, the Brennan firm filed in Walworth County Berner's claim for replevin of unrecovered items based on Tony's conversion of Berner's property. The property allegedly included: Berner's manufacturing processes, methods, formulas, and recipes; identities and information concerning the customers, supplies, milk producers, and brokers; and marketing sales plans, strategies, orders, credit memos, and commissions. The complaint sought judgment entitling Berner to immediate possession of the documents and compensatory and punitive damages. Berner also obtained an emergency ex parte restraining order, but had not informed the court about its self-help actions the day before.

¶9 At the hearing on the temporary restraining order, Dairy Source and the Steinmanns claimed that Berner had engaged in criminal conduct, theft of documents, and breaking and entering. The court did not rule on the temporary restraining order and the parties negotiated a mutual consent restraining order.

¶10 Berner filed a voluntary motion to dismiss the Walworth County replevin action and filed a suit in the United States District Court for the Eastern District of Wisconsin on May 1, 1999. This suit asserted claims based on alleged skimmed commissions, fraud, conversion, accounting setoff, misappropriation of trade secrets, infringement of trademark, defamation, civil conspiracy, and breach of fiduciary duty by Tony. The suit also sought punitive damages.

¶11 Dairy Source then filed a motion for attorneys' fees and costs in the Walworth County replevin action, claiming the suit had been frivolous. It also filed a new action in Walworth County against Berner, asserting claims for conversion, tortuous interference with contract, fraud, replevin, breach of fiduciary duty of loyalty, good faith in fair dealing, and defamation. The complaint also alleged a civil conspiracy to do the following: conversion, tortuously interfere with a contract, commit injury to business, misappropriate trade secrets, and commit trespass. Brennan served as Berner's defense counsel, although Berner claims Krug was overseeing the litigation and advising Brennan on strategy during these events.

¶12 In May 1999, Berner suggested settling all claims for a $300,000 payment to Dairy Source, but Krug allegedly discouraged the idea, claiming it would show weakness. Thus, litigation continued into 2000, with Berner incurring over $1 million in legal fees.

¶13 Brennan's defense strategy to the Dairy Source suit was to show that Berner had simply been following legal advice. As a result, Dairy Source sought to depose Krug. Because Krug had included a third party in some of the planning meetings for the "raid," he realized most of the notes would not be protected by attorney-client privilege. Dairy Source began deposing Krug in November 1999 and threatened to sue him as well. Berner claims it was never alerted to this possibility, although Krug and his attorney began demanding indemnification from Berner. On March 17, 2000, Dairy Source filed a motion to amend its pleadings to add Krug as a defendant.

¶14 This caused Brennan concern. Based on observations during the deposition, Brennan considered Krug a poor witness who apparently had lied under oath. Additionally, by this point, two courts had determined that, in fact, Krug's notes were not privileged and had to be released. This, Berner claims, was Brennan's "nightmare scenario."

¶15 Two attorneys from Brennan met with Berner to discuss settlement. The attorneys claim they told Berner the litigation was not going well, that the suit would be expensive to try, and that Berner could lose. Berner claims the Brennan attorneys thought they might also be sued, pressuring Berner to settle and presenting an "abrupt change" in the posture of the litigation. Previously, Berner had been assured of a "positive settlement" and was now being told it faced the potential for a multi-million dollar punitive damage award against it. Berner instructed one of the attorneys to demand Krug contribute $200,000 to the settlement.

¶16 On April 10, 2000, the Walworth County court ruled Krug could be joined as a defendant in Dairy Source's suit against Berner. There is no indication

Krug ever excused himself from Berner's employ. Following Krug's joinder, Berner settled all pending litigation with Dairy Source for $1.35 million. The principal amount was agreed to without either sides' attorneys present. The attorneys then negotiated the remaining terms, including a confidentiality agreement and dismissal of all three pending claims.[3] The agreement was signed by Berner, Dairy Source, Krug, and others, and included a release for Krug and other attorneys in the action.

B. Present Action

¶17 Brennan filed the present action against Berner for unpaid attorney fees. In addition to counterclaiming against Brennan, Berner filed a third-party complaint against Krug, alleging legal malpractice, implied indemnity, unjust enrichment, fraudulent concealment, breach of contract, equitable estoppel, and civil conspiracy. Certain claims were dismissed, leaving four claims: malpractice, breach of fiduciary duty, implied indemnity, and civil conspiracy.

¶18 Essentially, Berner claims that Krug did not fully advise it of the risks of the self-help procedure. Berner also claims Krug had a conflict of interest, improperly influencing settlement discussions to avoid his own liability without regard for his client Berner's interests. Krug moved for summary judgment dismissal of Berner's claims, arguing its case was fundamentally flawed absent expert testimony on whether Krug's alleged negligence was the cause of Berner's damages. Berner filed for summary judgment as well, claiming Krug violated his fiduciary duty as a matter of law. To support its claim, Berner produced the

[3] The three claims were the Berner suits against Dairy Source in Walworth County and federal court and the Dairy Source claim against Berner in Walworth County.

testimony of Peter Rofes, a professor at Marquette University Law School. Rofes testified that Krug's conduct fell below the standard of care but expressed no opinion on the causation question.

¶19 The trial court agreed with Krug, concluding "expert opinion as to causation in this case is necessary because of the technical and complex nature of the issues in this case and the claimed damages that flow from the asserted breaches of the attorneys' duty of care." Because Berner's expert did not provide this testimony, the court dismissed the malpractice claim.

¶20 The court then concluded that Berner's alternate claim for relief—breach of fiduciary duty as a matter of law—was legal duplication of the malpractice claim. The court also determined the fiduciary duty claim, as well as claims of implied indemnity and civil conspiracy, suffered from the same lack of proof as the malpractice claim. The court denied Berner's motion on the breach of fiduciary duty and granted Krug's motion, dismissing the claims. Berner appeals.

Discussion

¶21 This case is before us on a summary judgment motion. We review summary judgments de novo, using the same methodology as the circuit court. ***Machotka v. Village of West Salem***, 2000 WI App 43, ¶4, 233 Wis. 2d 106, 607 N.W.2d 319. The method is well-known and need not be repeated here. ***Id.*** Generally, we will affirm the circuit court's decision granting summary judgment if the record demonstrates that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. ***Id.***

Expert Testimony

¶22 The first issue is whether the trial court properly dismissed Berner's malpractice claim against Krug because Berner failed to present expert evidence as to cause. To succeed in a legal malpractice action, the plaintiff must show: (1) an attorney-client relationship; (2) acts or omissions constituting the alleged negligence; (3) cause; and (4) injury. ***Estate of Campbell v. Chaney***, 169 Wis. 2d 399, 405, 485 N.W.2d 421 (Ct. App. 1992).

¶23 Berner contends that, had the risks of self-help been fully and accurately explained, it would never have opted for that remedy. Therefore, Berner claims to have shown Krug's failure to properly advise it caused its damages.[4] The trial court rejected Berner's argument and concluded that expert testimony was necessary because of the technical, complex nature of the issues and "claimed damages that flow from the asserted breaches of the attorney's duty of care."

¶24 "Generally, an attorney is not liable for errors in judgment that are made in good faith, are well-founded, and are in the best interests of the client." ***Cook v. Continental Cas. Co.***, 180 Wis. 2d 237, 246, 509 N.W.2d 100 (Ct. App. 1993). Where an attorney fails to exercise reasonable care and professional skill in making that judgment, the attorney may be held liable for legal malpractice. ***Id.***

[4] The "damages" of which Berner complains are the $1 million in legal fees it incurred plus the $1.35 million settlement. Krug essentially argues that Berner really has no damages because unless it had opted to do nothing, there would have been some costs. However, Rofes testified that Dairy Source would have had no basis for its lawsuit if only a replevin action had been filed. Therefore, Berner would not have had to pay to defend the suit against it, nor would it have had to pay a settlement.

¶25 However, whether the attorney breached the applicable standard of care to the client "is a question of fact to be determined through expert testimony and usually cannot be decided as a matter of law." ***Id.*** (citing ***Gelsomino v. Gorov***, 502 N.E.2d 264, 267 (Ill. App. Ct. 1986)). Expert testimony thus is generally needed in a legal malpractice case to establish the parameters of acceptable professional conduct. ***Cook***, 180 Wis. 2d at 246 (citation omitted).

¶26 Rofes' testimony, acknowledged by the trial court, is that "Krug did not meet the standard of care required by the reasonable and prudent lawyer …." Thus, Rofes provided exactly the type of information we expect from expert witnesses in a legal malpractice case.[5]

¶27 However, the trial court concluded Berner's expert testimony was inadequate because Rofes:

> has no opinion concerning the legality of the … self-help activities nor does he have an opinion about any damages or injuries ….
>
> ….
>
> Initially, whether or not the self-help procedure utilized by Berner and developed by Krug is lawful is not something within the common knowledge or experience of a jury.
>
> ….
>
> Absent expert testimony on the legal validity of the self-help procedure and … [a] replevin action, a jury can only speculate as to whether or not the Plaintiff Berner should have instituted these procedures.

[5] We, of course, do not opine on the credibility or weight to be assigned to Rofes' testimony.

¶28 "The court has long recognized that certain kinds of evidence are difficult for jurors to evaluate without the benefit of expert testimony." ***Weiss v. United Fire & Cas. Co.***, 197 Wis. 2d 365, 378, 541 N.W.2d 753 (1995). At the same time, the court has emphasized that *requiring* expert testimony instead of simply permitting it is an extraordinary step to be taken only when "unusually complex or esoteric issues are before the jury." ***Id.*** at 379 (citation omitted). In legal malpractice cases, therefore, we have cautioned that expert testimony will only be required when related to "legal expertise" of a kind not within the realm of experience of an ordinary juror. ***Id.*** at 380.

¶29 Ultimately, whether expert testimony is necessary is to be construed on a case-by-case basis. ***Id.*** at 380-81. Lack of expert testimony in cases so complex or technical that a jury would be speculating without it constitutes insufficiency of proof. ***Id.*** at 381.

¶30 Here, though, it was error for the trial court to require Rofes' opinion on the *legality* of the self-help procedure. *See* ***Wisconsin Patients Comp. Fund v. Physicians Ins.***, 2000 WI App 248, ¶8 n.3, 239 Wis. 2d 360, 620 N.W.2d 457 ("[A]lthough an expert may opine on an issue of fact within the jury's province, he may not give testimony stating ultimate legal conclusions based on those facts.") (citation omitted). Moreover, the complex facts in this case referred to by the trial court and addressed by Krug on appeal do not go to the issue of cause. Rather, they constitute the "acts or omissions," which the jury must consider in determining whether Krug was negligent and, in fact, Rofes' testimony goes directly to that issue.

¶31 To survive summary judgment in this case, it was sufficient for Berner to offer proof that, in deciding to go ahead with self-help, it reasonably

relied on improper or erroneous information from Krug and that this reliance caused Berner's injury. Whether Krug's actions constitute malpractice, whether that malpractice indeed caused Berner's damages, and whether Berner really would have decided against self-help are issues to be resolved by a fact-finder, not a summary judgment motion.[6]

Breach of Fiduciary Duty/Undue Influence[7]

¶32 Berner complains the trial court erroneously dismissed its fiduciary duty/undue influence claims, and we agree that summary judgment was inappropriate on this claim. One reason the trial court dismissed this claim was because it concluded the breach of fiduciary duty claim had the same evidentiary failure as the malpractice claim. Because we rejected that conclusion on the malpractice claim, we reject it here as well.

¶33 The trial court also concluded that the malpractice claim and the breach of fiduciary duty claim were duplicative because they require the same factual underpinnings. We disagree. Although the same facts may be used in both determinations, each claim has different elements.

¶34 A fiduciary duty exists as a matter of law between an attorney and a client. *See* ***Morris v. Margulis***, 718 N.E.2d 709, 712 (Ill. App. Ct. 1999), *rev'd on*

[6] Krug challenges Berner's affidavits submitted in support of the damage claim as sham affidavits, because Berner admitted it had been advised of some risks of self-help. *See* ***Yahnke v. Carson***, 2000 WI 74, ¶21, 236 Wis. 2d 257, 613 N.W.2d 102. However, an affidavit that appears to contradict earlier testimony is not necessarily a sham if there is a reasonable explanation for the differences. ***Id.***, ¶18. Berner's complaint is that it was incompletely advised of the risk. Thus, the admission that it was advised of some risks does not irreconcilably conflict with the affidavit, which clarifies that *complete* and correct advice would have yielded a different choice.

[7] The breach of fiduciary duty claim is briefed on appeal as an issue of undue influence.

other grounds by 754 N.E.2d 314 (Ill. 2001). Through this relationship, duties such as fidelity, honesty, and good faith arise. ***Id.*** An attorney breaches these duties when placing his or her interests above those of the client. ***Id.***

¶35 Both legal malpractice and breach of the attorney's fiduciary duty require proof of an attorney-client relationship, but malpractice requires proof of "acts or omissions constituting negligence" and causation while breach of fiduciary duty requires proof that the attorney has elevated personal interests above the client's, benefiting at the client's expense. While under some scenarios the facts constituting the required proof might overlap, it is evident that they do not in this case. The malpractice claim arises from Krug's allegedly faulty advice regarding the propriety of self-help. The breach of fiduciary duty claim arises from events later in time, when Krug allegedly lobbied for indemnification in the settlement. Although the underlying facts are closely related, the claims remain separate and distinct.

¶36 Additionally, a question of fact remains on the breach question. Krug claims he was not the litigation attorney in this case, nor did he draft the settlement document, so he could not have been in a position to influence Berner. However, Berner offered proofs that Krug and his firm were pressuring both Brennan and Berner to secure his indemnification. Therefore, the record discloses a genuine issue of material fact.[8]

[8] Berner also complains the trial court improperly shifted the burden of proof, requiring Berner to prove Krug exerted undue influence instead of requiring Krug to rebut the applicable presumption. When an attorney benefits at the client's expense, the burden is generally upon the attorney to disprove any improper or undue influence. *See* ***Armstrong v. Morrow***, 166 Wis. 1, 7-8, 163 N.W. 179 (1917). However, without deciding whether the presumption applies here, we reverse on the alternate grounds explained above.

Implied Indemnity and Civil Conspiracy

¶37 These two claims were also dismissed on summary judgment because of the purported lack of proof. The court concluded that because the malpractice claim failed, the remaining claims did as well. We have concluded the malpractice claim did not suffer from lack of proof, so the court's basis for dismissing the implied indemnity and civil conspiracy claims no longer pertains. Therefore, we also reverse the dismissal of these claims.

By the Court.—Judgment reversed and cause remanded with directions.

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